



# ARIZONA

## REAL ESTATE BULLETIN

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*On-line Edition*

### Buyer's broker agreements must be in writing. But when?

An amendment to A.R.S. § 32-2151,02(A), enacted by the 1997 Legislature, requires that a buyer's broker agreement must be in writing and contain the same information as a listing agreement (seller's broker employment agreement). This means a buyer's broker agreement must:

- Be written in clear and unambiguous language;
- Fully set forth all material terms;
- Have a definite duration or expiration date, showing dates of inception and expiration;
- Be signed by all parties to the agreement.

The question raised by the Arizona Association of Realtors® and others was at what point in time is a buyer's broker agreement established? Commissioner Holt has issued this clarification:

"It is our position that the amendment was not intended to prescribe the exact point in a buyer-broker relationship in which the parties must enter into an agreement. Rather, the changes merely mandate that when the parties have an agreement, it must meet certain requirements. We believe that there is a buyer's broker employment agreement within the meaning of the statute when a buyer and broker agree that the broker represents the buyer and the buyer is obligated to the broker. It is at this point in the relationship that the contractual requirements of the statute becomeq applicable."

### Jonathan Wallick named Director of Education and Licensing Division

Jonathan G. Wallick has been appointed Director of the Department's Education and Licensing Division, replacing Don Vance who died of a heart attack June 23.

Mr. Wallick's was most recently engaged in the mortgage and securities fields and was most recently engaged in the negotiation of contracts and financing for Muzak service providers.

"Don's death was a terrible blow," said Commissioner Jerry Holt. "He made significant contributions to the Department, especially in streamlining the operation of Education and Licensing, and eliminating unnecessary regulation of real estate schools. We welcome John to the ADRE team."



*Jonathan G. Wallick*

### Brokers not responsible for employees' continuing education

Licensees are no longer required to submit continuing education certificates with license renewal applications as a result of an amendment to A.R.S § 32-2135(B) enacted by the Legislature as part of the 1997 Omnibus Real Estate Bill. Rather, the applicant is required to "certify" that the courses required for renewal have been taken. The amendment also requires licensees to retain the continuing education certificates for five years. If audited by the Department, a licensee must produce the certificates.

Substantive Policy Statement No.

41 has been issued to clarify a designated broker's responsibility regarding employees' possible false certification of continuing education credits and retention of the certificates. It states:

"Each real estate licensee, including a designated broker, is responsible for keeping the licensee's own continuing education certificates which are used to meet the continuing education requirement for license renewal. A designated broker is not responsible for ensuring that licensees attend continuing education classes or that the licensees keep their respective certificates for the requisite five years."

# The perils of 'one-stop' real estate shopping centers

by Nino Abate

More and more real estate brokers are offering a variety of in-house real estate related services such as real estate lending, residential appraisals, home inspections and escrow/title services. Proponents of this trend claim that it provides better service to consumers and allows smaller real estate and mortgage companies to stay competitive. However, critics argue that such arrangements lead to price gouging and fraud. Unfortunately, regulation of the real estate and banking industries has tended to side with industry critics, resulting in a maze of legal obstacles which, if not complied with, could result in fines, penalties and even license suspension or revocation.

## BILL AND TED'S NOT-SO-EXCELLENT ADVENTURE

Bill, a real estate broker, decided to expand his real estate brokerage to include a variety of real estate settlement services. Ted, a friend of Bill, who owns Excellent Mortgage, Inc., wanted to become Bill's in-house lender. Bill agrees to rent office space to Ted. Ted agrees to pay Bill rent at the fair rental rate plus a referral fee for every loan Bill refers to Ted. Bill then created two other companies: an appraisal service and a title insurance agency, which they also operate out of the same office. To encourage Bill's real estate salespersons to refer business to his affiliate companies, Bill offers every real estate salesperson a bonus for any referral.

Ted also proposes to hire some of Bill's top sales salespersons as loan officers. One of these Real Estate Agent/Loan Officers (REALOs), Rufus, was paid as a real estate salesperson and a loan officer on the same transaction. Rufus never mentioned the referral fee to his buyer. The deal closes escrow with no problems.

If some of the above referral fees are paid on federally-related mortgage loan transactions, have Bill and Ted violated any state or federal laws?

## STATE REGULATION

Bill and Ted's business activities have violated several Arizona statutes

and agency regulations.

First, a mortgage broker may only compensate another licensed mortgage broker or the employee of a duly licensed mortgage broker. A.R.S. §§ 6-903(E); 6-909(B). Ted's payment to Bill for referring business violates this prohibition and could result in, among other sanctions, the suspension or revocation of Ted's license. A.R.S. § 6-905(4).

Second, a loan officer may not receive compensation for rendering services as a real estate broker or real estate salesperson unless:

1. The loan officer is an employee of a duly licensed mortgage broker;
2. The loan officer discloses to the person from whom compensation is collected that the loan officer is also being compensated for rendering services as a real estate broker or salesperson. A.R.S. § 6-909(I). Here, Rufus failed to make the necessary disclosures. Again, this could result in the suspension or revocation of the mortgage broker's license and the imposition of civil fines. A.R.S. §§ 6-905(4); 6-909.

Third, a real estate broker or salesperson may not receive compensation for rendering services in negotiating loans secured by real property unless all of the following apply:

1. The real estate broker or salesperson is licensed as a mortgage broker or is an employee of a duly licensed mortgage broker;
2. The real estate broker or salesperson has disclosed to the person from whom compensation is collected that the broker or salesperson is receiving compensation for real estate sales and mortgage broker services;
3. The compensation does not violate any other state or federal law. A.R.S. § 32-2155.

Here, even though Rufus is an employee of Ted, Rufus failed to make the proper disclosures. This violation could result in the suspension or revocation of both Rufus' and Bill's real estate licenses. *See id.* A.R.S. § 32-2153(A)(3).

Lastly, it is a violation of state law for Bill to be in violation of any federal law or regulation governing real estate activities. A.R.S. § 32-2153(B)(10). Here, Bill has violated several applica-

ble federal regulations.

## FEDERAL REGULATIONS

Residential real estate transactions secured by "federally-related" loans are subject to the Real Estate Settlement Procedures Act (RESPA), which is enforced by the U.S. Department of Housing and Urban Development (HUD) under Regulation X. Violation of RESPA could result in severe civil liability, including treble damages and attorneys' fees, and possibly even imprisonment.

Generally, any referral fee arrangement is prohibited under Section 8 of RESPA unless an exemption to Section 8 applies. Currently, Regulation X provides a broad exemption allowing employers to pay referral fees to their own employees. However, HUD has recently proposed amending Regulation X. The proposed amendments would replace the broad exemption for payments by employers to their own employees with four narrow employer-employee exemptions.<sup>1</sup>

Under the proposed rules, an employer can pay a referral fee to an employee if:

1. The fee is paid to a managerial employee and is not calculated as a multiple of the number or the value of referrals;
2. The employee is not performing any settlement services, the employee has provided the person being referred with an approved disclosure statement, and the referral is to an affiliate or commonly owned business;
3. The employee referrals are generated for the employer itself, not its affiliates, or;
4. The affiliated business is in the same category of settlement service, the employee makes the proper disclosure and the employee does not perform any other settlement services in the same transaction. *See* 61 F.R. 56624; 61 F.R. 29238.

Here, Bill and Ted have three referral fee arrangements. First, Ted is paying Bill a fee for each loan Bill refers to him. Second, Bill is giving all of his real estate salespersons a bonus for referring business to one of Bill's affiliate real estate settlement service compa-

*Continued on page 12*



Jerry Holt

## News From The Commissioner

Soon after Don Vance joined the Department as Director of Education and Licensing, he began slashing away at what he felt were needless requirements which, over the years, had been piled on real estate schools. His voice would boom down the hall: "Why are we doing this? It's crazy! It doesn't make sense and I'm ending it."

We held our breath and let him slash. Soon, he had earned the nickname "Chain Saw" coined by those who become nervous when old ways of doing things come tumbling down. At the same time Don earned the everlasting thanks of school owners.

Then he turned his attention to licensing things that needed tumbling, especially some of the arbitrary requirements we had placed on those apply for or renewing a license.

Almost always, Don's changes made sense. Occasionally, someone would have to pull him aside and point out that his newest idea sounded good, but that it was just the least bit in conflict with the real estate statutes and could land us in hot water. He would relent, of course, then turn his attention to something he could change.

It was a shock when I received a phone call on the afternoon of June 23. Don had suffered a massive heart attack. He was in the hospital. His condition was grave. By evening, he was gone.

We miss him. We miss the sound of that saw. We know the Department will never be the same.

We welcome John Wallick who

has been appointed to replace Don. He inherits a Division that is leaner, more streamlined and happier.

### Problems with the Omnibus Real Estate Bill

Although a draft of the 1997 Omnibus Real Estate Bill was provided to every conceivable trade organization it might affect for review before it was submitted to the Legislature, the Arizona Association of Realtors® and others had serious problems with two provisions of the bill after it was signed into law. While no one argued with the idea that a buyer's broker agreement needs to be in writing and contain certain provisions, the question not answered by the legislation was when the agreement had to be executed and signed by the real estate agent and the buyer. We have resolved this—to the Association's satisfaction—as detailed in the story on page 1.

The other problem legislation was the amendment which requires licensees to certify they have taken the continuing education hours required for renewal rather than turning in continuing education certificates. Brokers asked if they would be held responsible if an employee lied about having taken the required hours. Would they be held responsible if the licensee couldn't produce the certificates if audited within five years of the renewal application? The answer is no. Again, this is explained in detail on page 1. We will introduce legislation in 1998 repealing the amendment. If enacted, new legislation will again require li-

censees to submit continuing education certificates with renewal applications.

### New Forms

The Omnibus Real Estate Bill had another effect. It made some of our most-often used forms obsolete. The bill's provision that licensees' home address and telephone number are no longer a matter of public record—unless that address and number are the only ones in our records, as is the case with inactive licensees—have caused us to redesign our license renewal application and change forms. Other forms are changed, as well. If you have any of these forms in stock, please destroy them. You may request a new supply from our Customer Services Division at (602) 468-1414, extension 100. Soon, you may download them from our web site at [www.adre.org](http://www.adre.org). The forms are:

- LI-200 Broker Change Form
- LI-202 Salesperson/Associate Broker Change Form
- LI-203 Salesperson/Associate Broker Renewal Form
- LI-204 Designated Broker Renewal Form

Information previously entered on these forms, home address, home telephone number, Social Security Number and date of birth, will now be furnished to the Department on Form LI-235, Licensee's Confidential Information Registration and Change Form. This document is not a matter of public record.

Anyone who files a late renewal application will be required to fill out Form INV-555 which is a revamp of the Unlicensed Activity Statement.

Two forms have been revised and consolidated. They are LI-211 Temporary Cemetery Salesperson's License Employing Broker Affidavit and LI-220 Membership Camping Salesperson's Certificate of Convenience Employing Broker Affidavit.



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### 1997 Schedule of Broker Audit Clinics

A.R.S. § 32-2136 requires all newly licensed real estate brokers to attend a Broker Audit Clinic presented by the Department within 90 days of issuance of their original broker's license. *Effective July 21, 1997, all designated real estate brokers must also attend a Broker Audit Clinic within 90 days after becoming a designated broker unless the broker has attended an audit clinic during the broker's current licensing period.* All designated brokers shall attend a broker audit clinic once during every four-year period after their initial attendance.

Seating is limited and reservations are required. To make a reservation for a Phoenix clinic, call the Department's Customer Services Division at (602) 468-1414, extension 100. In Tucson, call (520) 628-6940. Those who fail to make reservations will be turned away if seating is not available. Brokers who attend will receive three hours of continuing education credit in the category of Commissioner's Rules.

The following is the schedule of Clinics to be offered in Phoenix and Tucson during the remainder of 1997. Additional clinics may be scheduled from time to time at other locations in Phoenix and in rural areas.

PHOENIX  
Industrial Commission Auditorium  
800 W. Washington

#### Noon - 3 p.m.

September 19  
October 24  
November 21  
December 19

TUCSON  
State Office Building  
400 W. Congress  
Room 158

#### 8:30 a.m. - 11:30 a.m.

September 18  
October 23  
November 20  
December 18

### NOTICE

Effective August 22, 1997, the Department of Real Estate has discontinued charging a \$20 recovery fund fee for corporation, partnership or limited liability companies licensed pursuant to

A.R.S. § 32-2125(A)

The mission of the Arizona  
Department of Real Estate is to  
safeguard and promote the public  
interest through timely and capable  
assistance, fair and balanced  
regulation, and sound and  
effective education.



## ADMINISTRATIVE ACTIONS

### REVOCATIONS

**H-1866**

**Yohanna Stiger**  
**Phoenix**

DATE OF ORDER: April 28, 1997

FINDINGS OF FACT: Respondent submitted an application for a salesperson's license on July 11, 1994, in which she failed to disclose an indictment for criminal activity. On July 12, 1995, respondent pleaded guilty to a charge of conspiracy to possess narcotic drugs for sale, a felony. She was placed on probation for five years and sentenced to one year in the Mohave County Jail. She was also ordered to pay a fine of \$14,000.

Respondent failed to notify the Commissioner of her conviction within 10 days pursuant to A.A.C. R4-28-301(C)(1). She also failed to attend the administrative hearing in this matter. VIOLATIONS: Respondent procured a real estate license by misrepresentation or deceit and by making a substantial misrepresentation in violation of the provisions of A.R.S. § 32-2153(B)(1) and (B)(3).

Based on her felony conviction, the Commission is empowered pursuant to A.R.S. § 32-2153(B)(2) to impose discipline upon her license, and her conviction and period of probation, which is still being served, renders Respondent ineligible to renew her license as set forth in A.R.S. § 32-2130(E).

The evidence shows that Respondent is not a person of honesty, truthfulness and good character pursuant to A.R.S. § 32-2153(B)(7).

By failing to notify the Commissioner of her felony conviction, she is in violation of A.R.S. § 32-2153(A)(3) and A.A.C. R4-28-301(C)(1). DISPOSITION: Respondent's real estate salesperson's license is revoked.

**H-1841**

**William A. Carreras**  
**Scottsdale**

DATE OF ORDER: April 29, 1997

FINDINGS OF FACT:

COUNT I: In his January 23, 1996 application for an original real estate broker's license, Respondent failed to disclose that on July 17, 1995 he had been found guilty of fraud, a breach of fiduciary duty and conversion of property, and that a judgment had been entered against him in the amount of \$18,000 in Orange County (Calif.) Superior Court. He also failed to disclose that the California Commissioner of Real Estate had revoked his license on August 6, 1996.

COUNT II: In 1995, Respondent represented himself to Richard Zwijacz, Jr. to be a California and Arizona real estate broker, doing business as Weismann Equities, working with oil companies in developing locations for gasoline station/convenience stores.

Zwijacz paid Respondent \$35,000 toward the purchase of property at Highway 202 and Scottsdale Road in Tempe. Respondent represented that \$5,000 of the money would be used to conduct a proforma investigation of the prop-

erty.

Zwijacz initially paid Respondent earnest money in conjunction with an offer to purchase the property, but Respondent informed Zwijacz that the offer was rejected. Respondent then prepared an offer to lease the property which Zwijacz signed in February 1996. Zwijacz was required to deposit additional earnest money with Respondent.

No evidence was submitted to establish where Respondent deposited the earnest money deposits. Zwijacz never received copies of the purchase agreement or the offer to lease the property. Respondent was unresponsive to Zwijacz's inquiries regarding the status of the offer to lease.

The evidence showed that Respondent never conducted the proforma investigation or that plans were prepared by an architect for the development of the gas station on the property as promised by Respondent.

On August 30, 1996, Zwijacz sent Respondent a written demand for the return of the \$35,000. In November 1996, Respondent promised Zwijacz that he would start making payments to return the funds deposited with Weismann Equity. To date, Zwijacz has received one payment of \$2,000.

VIOLATIONS:

COUNT I: Respondent failed to notify the department of the revocation of his California real estate license within 10 days as required by A.A.C. R4-28-301(C). He procured a license by fraud, misrepresentation or deceit, or by filing an original application which was false and misleading, in violation of A.R.S. § 32-2153(B)(1). His conduct and actions show he made substantial misrepresentations in violation of A.R.S. § 32-2153(B)(3). His actions show he is not a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7).

COUNT II: His actions show he failed to deal fairly with all parties to a transaction within the meaning of A.A.C. R4-28-1101(A). He pursued a course of misrepresentation while acting in the role of agent for Zwijacz, in violation of A.R.S. § 32-2153(A)(1). He violated the provisions of Arizona Revised Statutes, Title 32, Chapter 20, and the Commissioner's Rules, within the meaning of A.R.S. § 32-2153(A)(3). His conduct constitutes negligence within the meaning of A.R.S. § 32-2153(A)(22). Respondent's conduct shows he violated State laws and rules that relate to real estate or involve fraud, substantial misrepresentation, dishonest dealings and a failure to deal fairly within the meaning of A.R.S. § 32-2153(A)(25). He made substantial misrepresentations in violation of A.R.S. § 32-2153(B)(3). He made false promises of a character likely to influence, persuade or induce, in violation of A.R.S. § 32-2153(B)(4). His conduct and actions show he is not a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7). DISPOSITION: Respondent's real estate license is revoked and he shall pay a civil penalty in the amount of \$2,500.

**H-1861**

**Pedro M. Carrillo**  
**Phoenix**

DATE OF ORDER: May 12, 1997

FINDINGS OF FACT: The Department summarily suspended Respondent's real estate salesperson's license on January 23, 1997, after it was learned that Respondent had been convicted of Attempted Sexual Abuse on September 11, 1996 in Maricopa County Superior Court. Respondent was served with the Order, and a Notice of Right to Request Hearing. Petitioner did not file a request for a hearing.

DISPOSITION: Respondent's real estate salesperson's license is revoked.

### CONSENT ORDERS

**H-1849**

**Consent order of Edmund J. Gorny and Joyce M. Kroff in the matter of the subdivision law violations of Brent Paustian, and in the matter of the unlicensed real estate activity of Cynthia Rice, and in the matter of the real estate broker's license of Edmund J. Gorney, and in the matter of the real estate licenses of Joyce M. Kroff and Michael M. Protega**

**Apache Junction**

DATE OF ORDER: March 12, 1997

FINDINGS OF FACT: Gorny, who was issued an original real estate broker's license in April 1981, was a self-employed broker doing business as C-21 Mountain View Investments (MVI). Kroff, who was issued an original real estate salesperson's license in 1984, was employed by MVI. Paustian was the owner and subdivider of Minnesota Manor Unit 3, a 28-lot subdivision in Maricopa County.

In December 1993, Paustian entered into an agreement to purchase lot No. 69 in Minnesota Manor and an option to purchase the remaining 27 lots. The escrow instructions made it clear that the responsibility to amend the public report was Paustian's. He was assisted in his offer to purchase Minnesota Manor lots by Kroff, acting as an agent for MVI, which had the exclusive listing. Kroff and the listing agent represented themselves in the contract and escrow instructions as "limited agents/facilitators."

Between April and August 1994, Paustian sold seven lots as improved lots upon which homes would be built for purchasers. Kroff was co-listing agent with another MVI agent on six of these lots and was the sole listing agent on one lot. Kroff and the co-listing agent were also the selling agents on six of the lots. Kroff was the exclusive selling agent on one lot.

All seven sales were made without a current public report and no receipt for a public report was signed by purchasers.

Between January 1995 and March 1996, Cynthia Rice, a mortgage broker, assisted Paustian in marketing and selling lots. In January 1995, at Rice's suggestion, Rice and Paustian entered into a so-called limited partnership in which Rice, for the financial investment of \$1, was allowed "contract negotiating powers on Minnesota Manor," would "incur no liabilities or

financial encumbrances," and would "receive a negotiated fee for each house sold or consulting work provided." Rice does not have an Arizona real estate license. This agreement was not filed or registered with the Arizona Corporation Commission.

Paustian agreed to the arrangement with Rice so he could avoid paying a 6 percent sales commission to real estate licensees. Rice acted as a real estate broker in approximately 12 sales.

From January to November 1995, approximately 13 sales were made, 12 of which closed escrow. None of these sales were made with a current public report and no receipt for a public report was signed by purchasers.

In May 1996, Paustian was informed by a title company representative that he was offering lots for sale without a public report. Paustian contacted the Department and has been cooperative in investigating and resolving this matter.

Gorny and Kroff attest that any violations of real estate laws were entirely inadvertent and resulted from their lack of familiarity with the subdivision statutes and rules.

**VIOLATIONS:** Gorny and Kroff:

- Offered for sale and sold lots in a subdivision without a public report in violation of A.R.S. § 32-2183(E).
- Used contracts in conducting lot sales which did not contain required public report disclosure language as required by A.R.S. § 32-2185.06 and A.A.C. R4-28-803(A).
- Failed to secure a receipt for the public report from each purchaser in violation of A.A.C. R4-28-803(B).
- Failed to protect and promote the interests of their client in violation of A.A.C. R4-28-1101(A).
- Assisted a subdivider in violation of the provisions of Arizona Revised Statutes, Title 32, Chapter 20, therefore in violation of A.R.S. § 32-2164.
- Based on the above violated the provisions of Arizona Revised Statutes, Title 32, Chapter 20 within the meaning of A.R.S. § 32-2153(A)(3), and were negligent within the meaning of A.R.S. § 32-2153(A)(22).

As employing and designated broker for the listing and selling agents of seven lots, Gorny failed to exercise reasonable supervision of the activities of his agents, in violation of A.R.S. § 32-2153(A)(21).

**DISPOSITION:** Gorny and Kroff shall each:

- Pay a civil penalty in the amount of \$2,500.
- Attend 12 hours of real estate continuing education classes.
- Purchase an Arizona Real Estate Law Book.

#### H-1869

##### **Michael E. Saager dba Saager Properties Scottsdale**

**DATE OF ORDER:** March 14, 1997

**FINDINGS OF FACT:** Saager, who was issued an original real estate broker's license in July 1986, was a self-employed broker doing business as Saager Properties.

In October 1995, Saager and his wife, Wendy, purchased approximately 2.66 acres from Lakeside Enterprises, Inc., in Navajo County. The Note and Deed of Trust contained partial release provision upon sale or transfer of one or more parcels. The purchase price for the property was \$63,412. The earnest money deposit

was a promissory note for \$5,000 to be paid by certified check at close of escrow, which occurred on October 20, 1995.

On November 21, 1995, Saager sold two parcels, approximately 1.25 and 0.4 acres in size, to Dr. Francis and Linda Surdakowski for \$88,500. On November 21, Surdakowski, through Saager, sold approximately 0.4 acres of the larger parcel to Garth Saager and Delores Saager, Saager's parents, for \$22,500. Wendy Saager notarized the property value statement and the Acceptance of Joint Tenancy. The warranty deed indicated that when recorded it was to be returned to Saager.

On November 21, 1995, Surdakowski, through Saager, sold approximately 0.4 acres of the larger parcel to C. Leland Rogers and Juliana Rogers for \$22,500. The warranty deed stated that once recorded it was to be returned to Saager.

On November 21, 1995, Surdakowski, through Saager, sold the smaller 0.4-acre parcel purchased from Saager to Elizabeth Sanchez for \$21,000. When recorded, the warranty deed was to be returned to Saager. Wendy Saager notarized the property value statement.

Surdakowski retained a parcel of approximately 0.45 acres of the 1.25-acre parcel.

On December 14, 1995, Saager sold approximately 0.4 acres to Franklin and Edithann Fortuna for \$29,500.

Escrow closed on Surdakowski's purchase of the two lots from Saager on the same date as the escrows in which Surdakowski sold the smaller parcel and the two parcels created from the larger parcel, which had been three-split.

The warranty deeds for purchasers Surdakowski, Rogers, Sanchez, Garth Saager and Fortuna were submitted by United Title Agency to the Navajo County Recorder's Office for recording on January 17, 1996.

On March 14, 1996, Saager deeded his remaining parcel of approximately 0.61 acres to Levi and Marcia Waldron. The Waldrons, on the same date, deeded the property back to Saager in two parcels, each approximately 0.3 acres.

Between October 2, 1995 and March 14, 1996, Saager orchestrated the split of the 2.66-acre parcel into seven parcels. Saager found purchasers, coordinated the transactions, had the recorded deeds returned to him, and had his wife notarize various transaction documents.

**VIOLATIONS:** Saager's actions resulted in the creation of a subdivision pursuant to A.R.S. § 32-2101(50). Saager, on his own behalf and on behalf of others, sold or offered for sale lots in a subdivision without first applying for an obtaining a public report, or an exemption to the public report requirements, in violation of A.R.S. § 32-2181(A) and (D). Saager's failure to advise purchasers that a public report was required prior to the offer or sale of the lots constitutes a violation of his fiduciary duty and a failure to deal fairly with all parties, in violation of A.A.C. R4-28-1101(A). Pursuant to A.R.S. § 32-2183(E), Saager's sale of subdivided lands prior to issuance of a public report renders the sales rescindable by the purchasers. Saager assisted others in the sale of subdivision lots, in violation of A.R.S. § 32-2164 and violated provisions of Arizona Revised Statutes, Title 32, Chapter 20,

within the meaning of A.R.S. § 32-2153(A)(3). **DISPOSITION:** Saager shall pay a civil penalty in the amount of \$6,000, shall bring the subdivision into compliance with Navajo County subdivision requirements and shall take 12 hours of continuing education classes.

#### H-1863

##### **Frederick G. Vogel dba Vogel Realty & Management Green Valley**

**DATE OF ORDER:** March 19, 1997

**FINDINGS OF FACT:** At all times material to this complaint, Vogel was licensed as a self-employed broker dba Vogel Realty & Management. On November 21, 1995, the Department conducted an audit of the books and records of Vogel Realty which revealed a \$5,970.52 shortage in Vogel Realty's Bank One Property Management Trust Account. On December 8, 1995, Vogel deposited \$5,262 from his general operating account into the trust account to correct the shortage. As a result of the audit, Vogel was issued an Administrative Warning on June 3, 1996.

On April 8, 1996, the Department conducted a follow-up audit which revealed a \$7,311.62 shortage in the trust account. Because Vogel did not have financial records available for review, the audit was continued to April 26.

On April 22, Harvey Weimer, Treasurer of La Cholla Hills Homeowners Association, gave Vogel, managing agent for La Cholla, a check for \$5,000 and instructed him to open a money market account on behalf of La Cholla at National Bank of Arizona and deposit the check into the account. Instead, on April 25, Vogel opened a new trust account with National Bank of Arizona and deposited La Cholla's check in the account.

On April 26, the Department resumed its audit which revealed that including the \$5,000 deposit Vogel had received from La Cholla, there was a shortage of \$190.16. The audit also revealed that a portion of the \$7,311.62 shortage discovered on April 8 was due to a \$5,000 draw Vogel made from the trust account on March 13 which he deposited into his personal business operating account on the same day. He then transferred \$6,000 from the same account.

On May 31, Vogel opened a money market account on behalf of La Cholla by depositing a \$5,000 check drawn from his general operating account.

**VIOLATIONS:** Vogel violated his fiduciary duty to his client and failed to deal fairly with all parties to a transaction within the meaning of A.A.C. R4-28-1101(A). He disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20 and the Commissioner's Rules, in violation of A.R.S. § 32-2153(A)(3). He commingled funds of clients with his own monies in violation of A.R.S. § 32-2153(A)(16). He demonstrated negligence in performing any act for which a license is required pursuant to A.R.S. § 32-2153(A)(22). He made substantial misrepresentations, in violation of A.R.S. § 32-2153(B)(3). His conduct and actions show he is not a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7).

**DISPOSITION:** Vogel's real estate broker's li-

cense suspended effective March 11, 1997, for a period of 45 days. Following the suspension period, the Department shall issue Vogel a two-year provisional real estate salesperson's license. During the two-year period, Vogel shall comply with the following terms and conditions:

- a. A designated/employing broker shall act as Vogel's Practice Monitor.
- b. Vogel shall not have access to a trust account during the suspension period.

Providing that he successfully completes the two-year provisional licensure period, he shall be reinstated as a broker, but shall not have access to a trust account for an additional two-year period.

He shall pay a civil penalty in the amount of \$2,000.

#### H-1872

**Tracy D. Birnie  
Scottsdale**

DATE OF ORDER: March 26, 1997

FINDINGS OF FACT: Birnie submitted an application for an original real estate salesperson's license on April 9, 1996.

In October 1992, while employed by First Interstate Bank, she used the credit card of a bank customer to acquire \$750 and attempted to acquire an additional \$900 two days later. On October 20, she resigned her position with the bank and repaid the \$750.

On September 15, 1993, she was convicted of theft, a class 6 undesignated offense.

In mitigation, she attests:

- a. The pressures and stress of financial obligations prompted her actions.
- b. She repaid the money shortly after the theft.
- d. This is her only criminal offense.
- c. She has worked as a house-sitter and book-keeper and has handled large amounts of cash for another employer who has found her to be trustworthy.

VIOLATIONS: Petitioner violated state laws within the meaning of A.R.S. § 32-2153(A)(3) and (25). She has been convicted of a crime involving theft, within the meaning of A.R.S. § 32-2153(B)(2). Her conduct shows she was not a person of honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: The Department shall issue Petitioner a two-year provisional real estate salesperson's license. During the two-year period she shall comply with the following terms and conditions:

- a. Each designated broker who employ's petitioner shall acknowledge having received and read a copy of this Order, and shall agree to act as her Practice Monitor [See note below — Ed.]
- b. She shall not be a signatory on or have access to any trust account or any other accounts which contain client funds.

#### H-1860

**Iris "I" Irelene Skelly  
Mesa**

DATE OF ORDER: March 27, 1997

FINDINGS OF FACT: Petitioner was first licensed as a real estate salesperson in July 1982. In her July 1996 renewal application, she disclosed a January 1996 DUI conviction and a February 1996 conviction of Threatening and Intimidating.

VIOLATIONS: Petitioner's convictions have negative implication with respect to her honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7). She failed to disclose the convictions to the Department within 10 days as required by A.A.C. R4-28-301(C)(1).

DISPOSITION: Petitioner's license is renewed, and suspended from April 1 to April 15, 1997. She shall take 12 hours of continuing education in addition to hours required for renewal. She shall pay a civil penalty in the amount of \$1,500.

#### H-1874

**Consent Order of Ralph D. Walters in the matter of Joseph A. Walker, dba Joe Walker Realty, and in the matter of Ralph D. Walters and Anna J. Walters.**

**Phoenix**

DATE OF ORDER: April 15, 1997

FINDINGS OF FACT: Ralph Walters is a licensed contractor and custom home builder. Neither Ralph nor Anna Walters hold an Arizona real estate license. Walker has been licensed as an Arizona real estate broker since June 1983.

In August 1995, Ralph Walters purchased lot 37, a five-acre lot, in Desert Hills Estates in Maricopa County. In August 1995, Walker prepared for Walters an offer to purchase Lots 30 (five acres) and the eastern half of lot 32 (2.5 acres) in Desert Hills. In November 1995, Walters recorded a map reflecting a dedicated roadway between lot 37 and the eastern half of lot 32. Lots 32 and 37 are contiguous, and therefore, when acquired by Walters, became one parcel pursuant to A.A.C. R4-28-1201(A). Walters split or planned to split his half of lot 32 into two parcels and split or planned to split lot 37 into four parcels, creating a total of six parcels. It was his intention to sell each of the six lots, building a custom home on each.

VIOLATIONS: Walter's actions resulted in the creation of a subdivision pursuant to A.R.S. § 32-2101(50). He sold or offered for sale lots in a subdivision without first applying for and obtaining a public report, or an exemption to the public report requirements, in violation of A.R.S. § 32-2181(A) and (D). His failure to advise purchasers that a public report was required prior to the offer or sale of subdivided lots, and the sale or offer for sale of the lots without a public report, renders the sales rescindable by the purchasers pursuant to A.R.S. § 32-2183(E).

DISPOSITION: Walters shall pay a civil penalty in the amount of \$1,000. He shall combine the remaining lots (32B and 37A-D) and shall divide them into no more than five parcels according to an agreed-upon map. He shall record a restrictive covenant that the combined properties may not be further split for five years. He shall notify the purchaser of lot 32A of his right to rescind the purchase.

#### H-1859

**William D. Wiese and in the matter of the corporate real estate broker's license of Encanto Homes, Inc.**

**Tucson**

DATE OF ORDER: April 15, 1997

FINDINGS OF FACT: In February 1989, Respondent was issued an original real estate license. The license was canceled on March 6,

1996, for abandonment of office. It expired October 31, 1996.

In December 1992, the Arizona Registrar of Contractors issued a Class B contractor's license to Encanto Homes, Inc. Wiese, owner and president, was the qualifying party for Encanto's contractor's license.

In April 1995, Wiese, through Encanto, had an option agreement on 23 lots with Patrece Herder of Homes by Herder, the fee owner of Bear Creek Estates. As a condition of the option, Encanto was required to take down, or purchase for resale, three lots each quarter year, to take down one additional lot within 60 days of the agreement and to build one model each on Lots 1 and 2. Encanto failed to timely meet the 60-day deadline.

In July 1995, Carole Deatherage and Mary Birmingham met with Wiese and contracted with Encanto for the construction of a custom home on Lot No. 7 of Bear Creek Estates. The contract provided for \$5,000 earnest money to be deposited with an escrow company and an additional \$100,000 to be deposited on or before close of escrow to be used to begin construction on the residence.

In September 1995, Deatherage and Encanto executed a new contract, superseding the July contract, in which Deatherage was the sole purchaser. Escrow closed immediately and the \$105,000 in escrow was disbursed. Construction was to begin within 30 days, or by October 7, 1995.

By closing on the Deatherage transaction, Wiese, through Encanto, received more than \$20,000 in cash and funds were available to begin construction. Encanto did not begin construction. Although the funds from this transaction enabled Encanto to delay foreclosure by Herder, under the terms of the option with Herder, Encanto was obligated to sell three more lots by September 24, 1995, and did not do so. Herder foreclosed on Encanto's option on October 2, 1995.

On September 26, 1995, Deatherage met with Wiese to discuss rumors that Encanto was experiencing financial problems and the impact such a situation would have on Encanto's construction of her home. According to Deatherage, Wiese informed her he doubted Encanto could complete construction and told her he would help her find another builder to construct her home for the balance due under the September 7, 1995, contract.

Deatherage was advised by one contractor that the funds remaining on the contract (\$166,073) were insufficient and that it would take approximately \$29,000 more to complete her home as contracted.

Encanto's contractor's license was canceled by the Registrar of Contractors on December 19, 1995, due to lack of a bond. Wiese did not disclose this to the Department.

Records at the Pima County Recorder's Office reflect 10 mechanic's liens filed against Encanto for nonpayment totaling approximately \$102,000.

After a hearing based on Deatherage's complaint, the Registrar of Contractors revoked Encanto's contractor's license. Wiese did not disclose this revocation to the Department.

The model homes which Encanto was to

build on Lots 1 and 2 as a condition of the option were not completed and had mechanic's liens filed against them in excess of \$80,000.

In mitigation and explanation, Wiese asserted that he was not in financial difficulty when he entered into the contract with Deatherage, but that health problems precluded him from working and led to his financial situation. VIOLATIONS: Respondent failed to deal fairly with all parties to a transaction when he did not disclose to Deatherage that he was close to losing his option in Bear Creek Estates, in violation of A.A.C. R4-28-1101(A). He failed to disclose both the suspension and subsequent revocation of his contractor's license within 10 days as required by A.A.C. R4-28-301(C). He demonstrated negligence by withholding from Deatherage information which he knew or should have known and which Deatherage reasonably needed to make a sound decision in contracting with Encanto through Wiese, in violation of A.R.S. § 32-2153(A)(22). Respondent, through his actions, has violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3).

DISPOSITION: Respondent is denied renewal and the right of renewal of his real estate broker's license and shall not apply for relicensure by the Department for 10 years after the date of entry of this Consent Order. If, 10 or more years after entry of this Consent Order, Respondent does apply for relicensure, it shall be as an original license applicant. He shall make complete application and shall not be granted a waiver of any education, experience or testing requirement.

*[Note: Respondent Wiese also signed a consent order, as president of Encanto Homes, in which the Commissioner denied the right of renewal of Encanto Homes' real estate broker's license and prohibited an application for relicensure for Encanto Homes for a period of 10 years.—Ed.]*

#### H-1868

**Lee Rhodes  
Glendale**

DATE OF ORDER: April 17, 1997

FINDINGS OF FACT: Respondent was issued an original real estate salesperson's license in June 1992. The license expired on June 30, 1996. Respondent was employed by Pro Star Realty. On December 5, 1996, Respondent submitted a late renewal application which is pending the outcome of this matter.

On January 25, 1995, Respondent and Tom Kugelman, as owners, listed property located in Phoenix for sale with Pro Star Realty under an exclusive-right-to-sell listing contract. Kugelman's real estate broker's license was revoked by the Department in 1990.

On February 12, 1995, Peter and Carla Fiske contracted to purchase the property from Rhodes and Kugelman. Escrow closed on February 28, 1995. In a Seller Property Disclosure Statement dated February 12, 1995, Rhodes and Kugelman stated that the roof on the house was new. In fact, the roof was not new but had been repaired by Rhodes and Kugelman prior to the sale.

After purchasing the property, the Fiskes experienced roof and interior home damage.

VIOLATIONS: Respondent pursued a course of misrepresentation by failing to truthfully disclose the status of the roof, in violation of A.R.S. § 32-2153(A)(1). His failure to disclose that Kugelman's real estate broker's license had been revoked constitutes a failure to disclose facts material to a transaction and failure to deal fairly with all parties to the transaction, in violation of A.A.C. R4-28-1101(A) and (B). Rhodes failed to fully cooperate with the Department's investigation of the complaint, in violation of A.R.S. § 32-2153(A)(17). He disregarded or violated provisions Arizona Revised Statutes, Title 32, Chapter 20, within the meaning of A.R.S. § 32-2153(A)(3).

DISPOSITION: Respondent's right to renew his salesperson's license is denied from July 1, 1996 to December 4, 1996. His real estate salesperson's license is renewed and is hereby suspended from December 6, 1996 to the date of entry of this Consent Order, whereupon he may apply for license reinstatement pursuant to A.R.S. § 32-2131.

He shall pay a civil penalty in the amount of \$1,000 and shall take 12 hours of continuing education in addition to hours required for license renewal. He shall purchase a current edition of the Arizona Real Estate Law Book.

#### H-1878

**Consent order of Carolyn K. Christy in the matter of the real estate broker's license of John Ninde and in the matter of the real estate salesperson's license of Carolyn K. Christy, aka K.C. Christy  
Tucson**

DATE OF ORDER: May 1, 1997

FINDINGS OF FACT: Christy was issued an original real estate salesperson's license in October 1984. At all times material to this matter she was employed by Realty World, Mike Dennis Realty. Her license expired October 31, 1996. She submitted a timely renewal application which is pending the outcome of this matter.

On October 16, 1995, R.L. Commercial, dba Roy H. Long Realty Company, listed for sale a 5-acre parcel of property in Tucson. The property was owned by Robert and Wilma Babikan of Wisconsin, and was offered for \$16,500. The listing stated electric service to the property was at the "road." Further, on a Property Profile Sheet faxed to Christy, in describing the availability of and distance to "power," the word "none" was circled and "3/4 mile" was the distance stated.

On November 30, 1995, Christy, as buyer's broker, presented an offer from Lawrence and Sandi Menden to purchase the property for \$14,000. The offer was made without first clarifying or verifying the listing information by researching the availability of residential electric power. The Mendens' offer was accepted by the sellers.

On December 1, 1995, the Mendens signed escrow instructions wherein they waived the right to further inspect the property and escrow closed on December 13. Prior to close of escrow, the Mendens represented to Christy their intent to move a double-wide manufactured home onto the property and to live there.

According to documents submitted to the Department, the listing agent, as agent for the

seller, conveyed information to Christy prior to close of escrow regarding the distance to residential electricity.

After close of escrow, the Mendens discovered that residential electricity was available three-fourths of a mile from the property. The power lines adjacent to the property are high-voltage transmission lines which cannot be used as a direct source of residential power.

The cost of bringing residential electric service to the property is estimated to be between \$33,000 and \$42,920.

In explanation and mitigation, Christy attests that the Mendens indicated that they planned to invest in solar power and were unconcerned about further checking into electrical service, and offered to purchase the property from the Mendens at the price paid, or to help them sell it at no charge.

VIOLATIONS: As the buyer's agent, Christy owed a fiduciary duty to the Mendens. She violated that duty by failing to determine and disclose that electrical power to the property was not readily available, a fact material to the transaction, as required by A.A.C. R4-28-1101(B). She failed to deal fairly with all parties to a transaction as required by A.A.C. R4-28-1101(A). She violated the provisions of Arizona Revised Statutes, Title 32, Chapter 20, and the Commissioner's Rules, within the meaning of A.R.S. § 32-2153(A)(3). DISPOSITION: Christy shall pay a civil penalty in the amount of \$1,000 and take six hours of continuing education in addition to hours required for license renewal.

#### H-1876

**Consent order of All Seasons Resorts, Inc. and ASR Resort Services, Inc. in the matter of All Seasons Resorts, Inc., All Seasons Realty, Inc., Johnny W. Griffith and Jeffrey B. Blair.  
Scottsdale and Sedona**

DATE OF ORDER: May 7, 1997

FINDINGS OF FACT: All Seasons Resorts is a time-share developer. All Seasons Realty is licensed as a corporate real estate broker. Griffith is the designated broker of All Seasons Realty. ASR Resort Services, Inc. is licensed as a corporate real estate broker. At all times material to this matter, ASR was wholly owned by All Seasons Resorts and was responsible for marketing and promotion of time-share intervals exclusively for All Seasons Resorts.

Marion Gold was the designated broker for ASR. Jeffrey Blair does not have a real estate license. He was employed as a regional marketing director for All Seasons Resorts and coordinated the use of promotional and advertising material on behalf of All Seasons Resorts.

In November and December 1996, a telemarketer employed by a vendor broker engaged by ASR solicited a Department representative to attend a time-share presentation by All Seasons Resorts. In exchange for attending the sales presentation, the telemarketer offered the Department representative a Carnival cruise package. The telemarketer claimed there were no exclusion dates for going on the cruise, nor was there a charge to participate in the offered cruise other than the cost of traveling to and from the departure location. The telemarketer stated that All Seasons had purchased a large quantity of the cruise packages and had been offering



the packages for three weeks.

The Carnival cruise promotion had been submitted to the Department on previous occasions and had been denied due to deficiencies on each of those occasions. The telemarketer's representations concerning the conditions for receiving the Carnival cruise were also false and misleading, since there were numerous exclusion dates, conditions to be met and a charge to participate in the offer.

On December 20, 1996, the Department issued a Cease and Desist Order to Respondents and a hearing was requested by All Seasons Resorts, All Seasons Realty and Griffith on January 7, 1997.

ASR represents that approximately 346 couples or individuals were solicited on behalf of All Seasons Resorts utilizing the unapproved cruise incentive, and has provided a preliminary listing of the offer recipients to the Department.

**VIOLATIONS:** The use of time-share promotional and advertising materials prior to approval by the Department is a violation of A.R.S. § 32-2197.11. One or more of the three contract vendors, each of which is a licensed entity with a designated broker, assisted ASR and All Seasons Resorts by promoting the time-share presentations utilizing the unapproved promotional materials, in violation of A.A.C. R4-28-502(F).

**DISPOSITION:** All Seasons Resorts and ASR shall cease any and all use of time-share advertising or related promotional materials which have not been approved by the Department.

All Seasons Resorts and ASR shall notify each offer recipient sent the unapproved Carnival cruise package and offer to substitute an approved cruise package.

All Seasons Resorts and ASR shall pay a combined civil penalty in the amount of \$5,000.

All Seasons Resorts and ASR shall change their organizational structure and/or internal procedures so that all promotional materials are reviewed by the designated broker of All Seasons Realty. All Seasons Realty shall be responsible for ensuring All Seasons' compliance with advertising laws and rules, whether such advertising or promotions are conducted by All Seasons Resorts, All Seasons Realty, or by other individuals or entities on behalf of All Seasons Resorts.

The Cease and Desist Order issued December 20, 1996, is vacated as to All Seasons Realty and Johnny Griffith.

#### **H-1867**

**James P. Dutton, dba On-Line Real Estate Tucson**

**DATE OF ORDER:** May 8, 1997

**FINDINGS OF FACT:** Dutton was licensed as a real estate salesperson until July 18, 1995 when he was issued a real estate broker's license. From May 20, 1993 to May 1, 1995, Dutton was employed as a salesperson by Victor Mergard Associations, Inc. dba Century 21 Ability Realty. Since June 18, 1995, Dutton has been licensed as a self-employed broker doing business as On-Line Real Estate. His broker's license expired May 31, 1997.

In January 1995, Dutton entered into an Exclusive Right to Sell (Employment Agreement)

with Jeff and Patricia Hall to list and sell their residence in Tucson through Ability Realty. In April 1995, Dutton suggested to the Halls that they lease the residence to maintain a cash flow until the residence could be sold.

The Halls entered into a property management agreement with Dutton to manage the residence, pay the mortgage and provide the remainder of any monies collected from the lease to the Halls. In May 1995, Dutton transferred the employment agreement to sell the residence to On-Line Real Estate.

In June 1995, Dutton entered into a rental agreement with his sister, Sheila M. Yarbrough, and Robert E. Templeton for the lease of the residence from June 1, 1995 through May 31, 1996. From May 26, 1995 through August 24, 1995, Dutton, acting as property manager, received \$2,588 in cash and a \$3,550 check from the Lessees for lease deposit and rent. Dutton failed to deposit the monies into a trust account; instead, he deposited the \$3,550 check into his business operating account and made various cash payments with the cash he received. He purchased money orders to make payments on the Hall's first and second mortgage loans and their Visa account. He also made cash payments for repairs that were made to the residence.

On June 21, 1995, Dutton, acting as a principal, prepared and entered into a real estate purchase contract with the Halls to purchase the residence. The contract provided that Dutton would purchase the residence for \$80,000 with a \$100 earnest money deposit. As provided in an addendum to the contract, Dutton paid the Halls an additional \$1,500 as a partial down payment on the residence. The Halls relied on Dutton's representations as to his intent to purchase the residence and signed the purchase contract.

On August 22, 1995, the Halls went to the title company for the scheduled closing but Dutton failed to attend. The escrow agent told the Halls that Dutton had advised her he did not have the money for the closing costs.

Dutton's property management ledger fails to properly account for the monies he received from the Lessees during his management of the residence. Upon his termination as property manager of the residence, Dutton retained some of the lease monies he had received from the Lessees.

**VIOLATIONS:** Dutton deposited advance payment of monies belonging to others in his personal account and commingled monies belonging to others with his personal monies, in violation of A.R.S. § 32-2151(B)(2). He violated his fiduciary duty to the Halls by failing to protect and promote their interests in violation of A.R.S. § 32-2153(A)(3) and A.A.C. R4-28-1101(A).

He commingled the funds of clients with his own money and converted monies for his own use within the meaning of A.R.S. § 32-2153(A)(16). He failed to maintain an accurate accounting of monies received and dispensed in his role as the Hall's property manager, in violation of A.R.S. § 32-2153(A)(18).

He violated his fiduciary duty to the Halls as their real estate and property management agent by negligently failing to keep accurate

records, failing to properly account for all funds received and expended, and by failing to deposit lease monies he received into a separate escrow or trust account, in violation of A.R.S. § 32-2153(A)(22).

**DISPOSITION:** Dutton's real estate license is revoked. He shall not reapply for an Arizona real estate license for 10 years from the date of entry of this consent order.

#### **H-1832**

**Cydney D. Currell**

**Lake Havasu City**

**DATE OF ORDER:** May 17, 1997

**FINDINGS OF FACT:** On January 19, 1996, Petitioner submitted an original application for a real estate salesperson's license in which she disclosed two misdemeanor DUI convictions. The Department denied her application and she requested an administrative hearing. On April 8 and October 9, 1996, she filed separate letters with the Department withdrawing her request for a hearing.

On November 16, 1992, Petitioner was convicted of DUI in Napa County (California) Municipal Court and was placed on five years summary probation. Her probation is expected to continue until November 16, 1997.

On February 29, 1996, she was convicted in Lake Havasu City Municipal Court of DUI. The court placed her on one year unsupervised probation.

**VIOLATIONS:** Petitioner's DUI convictions have negative implications with respect to her honesty, truthfulness and good character within the meaning of A.R.S. § 32-2153(B)(7).

**DISPOSITION:** Petitioner's application for a salesperson's license is granted provided that she satisfies all conditions set by the Department. The Department shall issue an 8-month provisional license. During all periods of active licensure Petitioner shall comply with the following terms and conditions:

- a. Prior to the Department's issuance of the license, Petitioner shall submit to the Department the name of an Arizona licensed counselor, with a Master of Science Degree, whose practice includes substance abuse counseling, selected to examine and evaluate Petitioner on a monthly basis. The Counselor is to monitor Petitioner's conduct and report to the Department if the counselor believes Petitioner is drinking excessively as set out in paragraph (d) below.
- b. Petitioner shall undergo counseling monthly, or more frequently if deemed required by her counselor. Within 30 days following the 8-month period, the counselor shall submit a written report evaluating Petitioner's potential for substance abuse to the Department's Compliance Officer.
- c. The Commissioner may suspend Petitioner's license if the report shows a lack of cooperation or any potential for substance abuse.
- d. Petitioner shall comply with the provisions of Arizona Revised Statutes, Title 32, Chapter 20 and the Commissioner's Rules. Petitioner must not drink alcohol to excess. Any other conviction for any substance abuse offense during the 8-month period shall result in automatic suspension of her license.

## Unlicensed 'handyman' repairs can mean trouble

The complaint of a Sierra Vista building contractor, and the response by an official at the Arizona Registrar of Contractors (ARC), should be of interest to all real estate licensees, but especially to those who manage rental property.

The contractor wrote to Alex F. Jacome, ARC's Southern Arizona Regional Manager, expressing concern about the number of property managers who hire unlicensed contractors to make repairs to rental property.

"Some of the property managers have licensed contractors to make these repairs but some hire unlicensed handymen," the contractor wrote. "Basically, my point is that these (property) owners are not aware of the laws regarding rental properties. I feel these property managers (licensees) are breaking the law and jeopardizing the owners of these properties.

"I believe we need more emphasis on educating the general public and clarification of the laws. Secondly, more pressure needs to be placed on the Arizona Real Estate Department to educate Realtors.®"

In his response to the letter, Mr. Jacome pointed out that this is not a problem that exists solely in Sierra Vista. Often times, he wrote, well-intentioned real estate licensees, trying to help a buyer or seller or a rental property owner, will recommend a "friend," an unlicensed handyman, to make repairs. If the cost of the repairs exceeds \$750, the statutes require that a properly licensed contractor must be used.

It's not difficult to rationalize the hiring of an unlicensed handyman, Mr. Jacome pointed out. "You don't really need a permit," "It's the City's way of raising money," "It's a government rip-off," or "I can do it without spending the extra money," are excuses he said are given all the time. He added that some licensed contractors use these dodges, as well.

"We try to point out to the real estate industry that they may be putting their clients and customers at risk. We also tell them that well-meaning real estate licensees (who employ unlicensed handymen) can open the door

## Licensees suspended for failure to attend Contract Writing class

Prior to July 21, 1997, Commissioner's Rule R4-28-401(E) required each newly licensed real estate salesperson to take six hours of continuing education in real estate contract law and contract writing within 90 days of licensure.

Effective July 21, 1997, newly licensed real estate salespersons must complete the Contract Writing class before they may obtain an active license (A.R.S. § 32-2124).

Contract Writing classes are offered by most Arizona real estate schools. Licensees who failed to provide proof of having taken the Contract Writing class as required before the statute was amended were summarily suspended. The suspension is lifted when satisfactory evidence of attendance is furnished to the Department within 30 days.

The following licensees received summary suspensions on the dates indicated.

Name	Suspension Date
Baxter, Richard J.	7/24/97
Bond, Beverly A.	7/24/97
Bond, Garron K.	7/24/97
Brady, Rhonda N.	7/24/97
Brown, Kelly S.	7/24/97
Burke, Sterling W.	7/24/97
Capel, Blair E.	7/24/97
Choate, John T.	7/24/97
Cota, Brenda G.	7/24/97
Cretton, Susan A.	7/24/97
Croteau, Russell E.	7/24/97
Denny, Dennis D.	7/24/97
Eckleberry, Janice M.	7/24/97
Elmer, Derrell S.	7/24/97
Fogarty, Carole A.	7/24/97
Fogarty, Thomas L.	7/24/97
Fox, Jody S.	7/24/97
Froutzis, Mina	7/24/97
Fulton, Charles D.	7/24/97
Gamez-Scarlett, Ruth	7/24/97
Giese, Kirstina A.	7/24/97
Golab, Sherryl L.	7/24/97
Grant, Steven M.	7/24/97
Haley, Alex J.	7/24/97
Hansen, Inga L.	7/24/97
Harrian, Tamara L.	7/24/97

Hauschild, David C.	7/24/97
Hogle, Harold B. Jr.	7/24/97
Houser, Terri W.	7/24/97
Jaeger, Charles J.	7/24/97
Knoll, William B.	7/24/97
Koudelka, Christine A.	7/24/97
Kuszmar, Jean A.	7/24/97
Lancaster, Jay E.	7/24/97
Ledenbach, Kathryn L.	7/24/97
LePage, Lois J.	7/24/97
Lewis, Daniel R.	7/24/97
Lewis, James Q. Jr.	7/24/97
Lucchese, Jennifer D.	7/25/97
Ma, Henry K.	7/25/97
Malvar, Peter R.	7/25/97
Mancia, Roger	7/25/97
Marks, Dennis J.	7/25/97
McCloskey, Terri L.	7/25/97
McCracken, Mark E.	7/25/97
McPherson, Scott T.	7/25/97
Morales, Marcos	7/25/97
Nunley, Robin L.	7/25/97
Obregon, Kim M.	7/25/97
Olivas, Dawn A.	7/25/97
Olszowy, Paul	7/25/97
Patton, Michael, K.	7/25/97
Pecor, Mary L.	7/25/97
Pescatore, Marianne	7/25/97
Pierce, Martha C.	7/25/97
Price, Kristina M.	7/25/97
Pryor, Victor	7/25/97
Putman, James J.	7/25/97
Regan, Gloria J.	7/25/97
Rhyne, Robert L.	7/25/97
Rogers, Jeffrey L.	7/25/97
Shipp, Tyler	7/25/97
Smith, Kelly A.	7/25/97
Strader, Douglas A.	7/25/97
Storey, Zachary A.	7/25/97
Stouffer, Eugene D.	7/25/97
Stuller, Robert R.	7/25/97
Taylor, Douglas A.	7/25/97
Thorp, Samantha	7/25/97
Towt, Jennifer D.	7/25/97
Varga, Wayne F.	7/25/97
Walker, Philip	7/25/97
Wasley, Susan	7/25/97
Welsh, Kristy E.	8/6/97
Whiting, Karen	7/25/97
Wright, David R.	7/25/97
Zinser, Kit	7/25/97

to liability for their brokers, particularly when you take into consideration the Real Estate Commissioner's tough stance on disclosure.

"We try to educate licensees re-

garding the fact that contracting without a license is a crime in the state of Arizona and ask for their understanding and help."

## Department processes first 'ERP' public report in 48 hours

The first application for public report received by the Department which used the new "Expedited Registration Program" (ERP) was filed on Friday, August 22. The Department reviewed the application and certified it as administratively complete—clearing the way for property sales—on Monday, August 25, well in advance of the 15 business days allowed by law to process applications under the new program.

The ERP, made possible by an amendment to A.R.S. §§ 32-2183 and 32-2195.03 contained in the 1997 Omnibus Real Estate Bill, provides developers who are selling improved subdivision lots (lots with dwellings) and unsubdivided lands with the option to prepare their own public reports and bypass the Department's detailed

examination of their applications for public report. If this option is selected, the developer's application will be examined only to assure that it is "administratively complete," that the correct and complete application form with all required disclosures is filed, all required supporting documentation including filing fees are provided and a public report prepared in accordance with the Department's format has been included with the application.

Upon receipt of an ERP application, the Department will assign it a license number and deposit the fees. Within 15 business days the Department must certify the application as administratively complete, authorizing sales, issue a denial of the certification or return the application with a deficiency letter, providing the developer

30 days to return a complete and accurate application. If the developer fails to meet the 30-day refiling requirement, a new application with fees is required. Upon issuance of the certification, the developer is responsible for placing the license number on each public report.

After issuance of a Certification of Administrative Completeness, the Department may perform a detailed examination of the application under the same procedures as if it were preparing the public report. If it is determined the developer or development is not in compliance with state law, or grounds exist to suspend or revoke the public report, the Department may commence an administrative action, which may include license suspension

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## Do your signs comply with the Commissioner's Rule?

The Department continues to receive complaints from real estate brokers alleging that competitors are violating Commissioner's Rule R4-28-502.

Specifically, the complaints con-

cern brokers who allow their licensed employees to erect "for sale" signs which display the licensee's home telephone number, and brokers who allow employees to run newspaper ads which

show only the licensee's home, personal or voice-mail telephone numbers, without displaying the designated or employing broker's telephone number.

R4-28-502 states:

(C) Advertising of any service for which a license is required shall not be under the name of a salesperson unless the name of the employing broker is also set forth.

(D) All advertising by licensees, including, but not limited to, newspapers, magazines, circulars and business cards, shall include either the name in which the employing broker's license is held or the fictitious name contained on the real estate...license.

(F) All advertising shall be under the direct supervision of the employing and, if applicable, the designated broker.

If an advertisement contains a telephone number other than that of the employing or designated broker as shown in Department records—a salesperson's or associate broker's home phone, for instance—the ad must also display the telephone number of the employing or designated broker. For instance, if Sally Black wanted to erect a "for sale" sign listing her home phone number, the ad should state:

Sally Black  
(602) 555-1234  
Middle Ground Realty  
(602) 555-9876

## State Land cracking down on illegal off-site real estate signs

The State Land Department is cracking down on real estate developers who place off-site advertising signs on land owned by the State of Arizona without first obtaining a Special Use Land Permit and paying a fee. Erection of signs without a permit violates laws which require the State to be compensated for any use of state land other than hunting or fishing, or archeological activities.

Bill Webster, a National Resources Manager for the State Land Department, said developers have put signs on state land for years without obtaining a permit and paying a fee. In the past six months, however, the Land Department has been enforcing regulations more strictly. Developers who erect signs without a permit are assessed a trespass fee and are required to remove the signs.

Developers who fail to comply with the law may be also prosecuted by the

Office of the Attorney General, Webster said.

Maps depicting the location of state land are available for inspection or purchase at the Department's offices in Phoenix, Flagstaff and Tucson.

Anyone who wishes to place a sign on state land should obtain an application for a Special Land Use Permit by visiting the Land Department's offices or requesting that a form be mailed to them by calling Bob Zapponi at (602) 542-2632. Because various governmental jurisdictions must be given time to comment on the proposed sign, it can take as long as six months to obtain a permit. If the application is approved, the developer must pay an annual rental fee.

A developer should also check with the local planning and zoning authority to determine whether any county or municipal restrictions apply to off-site real estate advertising signs.

## One-stop

*Continued from page 2*

nies. Neither of these cases involves a referral between an employer-employee (real estate salespersons are normally independent contractors, not employees). Therefore, the proposed employer-employee exemptions are inapplicable.

The third referral fee arrangement, however, is between an employer-employee. Ted is paying a referral fee to this REALO. REALOs should qualify under the third employer-employee exemption. However, Ted may still find himself in legal difficulties. First, to avoid characterization that this employer-employee arrangement is a sham, the REALOs must actually provide services as loan officers. Second, even if Ted can show that services were provided and that he is in compliance with RESPA according to FHA guidelines, FHA will refuse to insure any loan where a real estate broker or salesperson also acted as a loan officer on the same transaction. *See* Mortgagee Letter 95-36. Thus, under existing FHA policy, a real estate salesperson cannot act as a mortgage officer on the same transaction involving a federally-related mortgage.

### CONCLUSIONS

Under existing state and federal law, almost any referral fee arrangement is prohibited. Under HUD's proposed rules, several exceptions may apply. However, even under the proposed rules, a real estate broker may only charge, and a mortgage broker may only pay, the fair rental value for office space—nothing more and nothing less. Also, a real estate broker may never pay referral fees to non-licensees.

If the referring party is an employee, a real estate broker must take care that the other elements of the applicable employer-employee exemption are satisfied before any fees are paid.

Though one-stop real estate shopping centers may offer significant economic benefits to both the consumer and broker, the cost in terms of potential liability is significant. To avoid a "not-so-excellent adventure," consult your attorney first.

<sup>1</sup>HUD announced on June 7, 1996, that it was amending Regulation X to restrict referrals to affiliated businesses. See 61 F.R. 29238. These changes were to become effective on October 7, 1996. However, Congress decided to delay the effective date of the June 7, 1996 final rule regarding payments to employees by their employers to no earlier than July 31, 1997. *[The effective date of the rule had not been determined on September 8 when this issue of the Bulletin was published—Ed.]* HUD also proposed a fourth employer-employee exemption that would allow payment of referrals if the affiliated business is in the same category of settlement service. See 61 F.R. 56624.

*Nino Abate is an associate with the law firm of Mark L. Manoel, P.C., and practices primarily in the fields of real estate and commercial law. He can be reached at (602) 234-9888.*

## Public Report

*Continued from page 11*

or revocation, fines or rescission offers to purchasers. The Department shall vacate its action if the developer satisfies all deficiencies or corrects all violations of law within five business days from the date the developer receives notice of the Department's

## How to contact ADRE by phone, fax and modem

### PHOENIX OFFICE

(602) 468-1414

Fax Numbers

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Administration Division 135

Auditing and Investigations 500

Subdivisions 400

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### WORLD WIDE WEB

[www.adre.org](http://www.adre.org)

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[cdowns@adre.org](mailto:cdowns@adre.org)

action.

Filing procedures and forms have been established by the Department for use with ERP applications. For copies of these procedures and forms, please contact the Subdivision Division in Phoenix at (602) 469-1414, extension 400, or the Tucson office at (520) 629-6940.

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